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Naked Hiker Cleared - The Law Prevails

Naked Hiker Cleared - The Law Prevails

Posted By **Gleb Bazov**

6 months ago

Dear Orillians,

The case of the Naked Hiker, who was recently acquitted of indecency charges, has caused an unexpected flurry of comments, both on the Orillia Packet & Times website, and elsewhere on the internet. While I would not usually comment, some of the objections to the decision that have been made need to be corrected.

First, allow me to address the point that my client will someday run out of money for legal representation. This may surprise some, but there are those in the legal profession, like me, that believe in *pro bono* work and in advancing important legal causes. It is the legal profession's responsibility to ensure that legal principles are appropriately defined and applied, whether in Orillia, Toronto, Thunder Bay, or Ottawa.

Second, permit me a slight detour into the argument regarding the nudity charge. The Attorney General rarely, if ever, gives consent for Crown prosecutors to proceed with nudity charges. One of the reasons is the viscerally political history of this specific offence. Section 174(1) (or, at least the increased penalties for public nudity, from 6 months to 3 years of imprisonment, applied in the early part of the 20th century) is sometimes referred to as the "Doukhobor Clause", because, at that time, it was used primarily to persecute and imprison Doukhobor protesters that organized nude marches for political reasons. Section 174(1) has always had strong political associations, and, for that reason, proceedings under this section are extremely rare.

Now, in my opinion, there is a fallacy in the way that section 174(1) has been employed in this and other cases involving nudists and naturists. The requirement of consent from the Attorney General applies to the commencement of proceedings, i.e. the laying of a charge, not to proceeding with an actual criminal trial on the merits, once the accused is charged. It is incumbent on Crown prosecutors and the police to seek the Attorney General's consent *before* charges are laid, not *after* an accused has been subjected to criminal jeopardy and

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required to attend in court to defend him or herself. If the requirements of procedural fairness, clearly spelled out in section 174(1), were actually followed, it is highly likely that section 174(1) would quickly fall into disuse and remain on the books only as an outdated legal imaginary referential to an older system of values, beliefs and fears, such as an equally anachronistic witchcraft offence found in section 365 of the Criminal Code.

The second reason why section 174(1) proceedings are extremely rare has already been referred to in the Orillia Packet & Times forum. Specifically, the Supreme Court, in my respectful opinion, has long considered this section of the Criminal Code to be redundant and unnecessary, and accordingly has narrowed the definition of nudity to require complete nudity.

The third reason is specific to this case and to another case, currently being defended by Clayton Ruby on behalf of his client. In this case, as in the one Clayton Ruby is conducting, notice was given to the Crown prosecutor that any charges under section 174(1) would be challenged under the relevant provisions of the Charter of Rights and Freedoms ("Charter"). While, in the Orillia Packet & Times forum, a lot of emphasis has been placed on the fact that the Attorney General did not give consent (or no consent was sought) for a charge under section 174(1), and this point is correct, the primary challenge to the charge was not made on that basis. On the contrary, the issue did not even come up in the several court appearances and in correspondence with the Crown prosecutor. Instead, the primary emphasis was on the Charter challenge and the defence position that the application of section 174(1) in this case violated the Charter and ought to be limited or struck on that basis. The charge ultimately was withdrawn, and no explanation has been given by the Crown prosecutor as to the reasons therefor. It is only by implication that we can deduce that the Attorney General did not give the requisite consent - no such authorization was disclosed by the Crown prosecutor.

Finally, there is no reason to belabour the topic of public indecency charges any further than has already been done. The article Naked Hiker Cleared speaks for itself. In case any of you are interested in the case law that was used in this case, please refer to the Court of Appeal decision in *R. v. Jacobs (1996)*, 112 C.C.C. (3d) 1, 31 O.R. (3d) 350. *That* is what was argued in this case, and *that* is what was applied by the Trial Judge. In *R. v. Jacobs*, a university-age woman, bare to her midriff, took a long walk along several busy streets in Guelph, Ontario. Multiple onlookers, gawkers and even police officers observed her. Children and elderly were among the witnesses. Jacobs was making a point - women should be permitted to walk bare-breasted equally as men. The trial judge disagreed and stated that the determination of whether conduct is indecent must be made in the context of the general community standard. In his determination of the community standard, he attached significance to the fact that women have generally chosen not to be seen publicly with their breasts exposed. The Ontario Court of Appeal rejected the trial judge's reasons, found that he made an error of law and acquitted Jacobs. The Court of Appeal, stated, in part:

- "In applying the community standard of tolerance test, the court must consider what harm will accrue from exposure to the allegedly obscene act or material. The correlation is inverse in the sense that the greater the harm that may flow from a particular exposure, the less the community will tolerate others being exposed to it. Tolerance cannot be assessed independently of harm."

- "Both the trial judge and the summary conviction appeal court judge erred in law in applying the wrong test to determine whether the appellant's conduct was indecent. They used a test of acceptance based upon the trial judge's assessment of how women choose to act, as opposed to what the contemporary national community would tolerate."

- "There is no evidence of harm that is more than grossly speculative. All that the trial judge had before him was some evidence indicating specific individuals' lack of acceptance of the appellant's choice of clothing. There was nothing degrading or dehumanizing in what the appellant did. The scope of her activity was limited and was entirely non-commercial. No one who was offended was forced to continue looking at her. I cannot conclude that what the appellant did exceeded the community standard of tolerance when all of the relevant circumstances are taken into account. It follows that what the appellant did on July 19, 1991 did not constitute an indecent act."

I will leave you with the following consideration. Indecency is actual harm, not immorality. Next time you argue that a naked hiker is engaging in indecent conduct, consider the case of a corporation pumping contaminants into a public sewer. Which of the two is indecent?

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